Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BRIAN KEVIN CLEMENT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should resolve a recurring and important issue of law that has split the circuit courts of appeals: whether a criminal conviction for a violation of 18 U.S.C. §§ 922(a)(5) and 924(a)(1)(D) requires proof beyond a reasonable doubt that the defendant acted willfully -- as the majority of circuits and district courts have held -- or merely that the defendant acted knowingly, as the Second Circuit maintains?

2. Whether it is reversible error to fail to charge an element of the offense where there was no evidence at trial establishing the element and any objection would have been futile because the district court's failure to charge the element was mandated by controlling, though erroneous, circuit precedent?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Kevin Clement prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The Summary Order of The United States Court of Appeals for the Second Circuit, dated August 21, 1996, is Appendix A to this Petition.

JURISDICTION

The decision below affirmed petitioner Clement's judgment of criminal conviction dated June 27, 1995 (Appendix C). A petition for rehearing and suggestion for rehearing in banc was denied by Order, dated October 8, 1996

(Appendix B). This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

18 U.S.C. § 922(a)(5) provides in pertinent part:

> It shall be unlawful . . . for any person . . . to transfer . . . any firearm to any person . . . who the transferor knows or has reasonable cause to believe does not reside in . . . the State in which the transferor resides.

18 U.S.C. § 924 provides in pertinent part:

(a) (1) Except as otherwise provided . . . whoever -

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), (r), (v) or (w) of section 922;

(C) knowingly imports or brings in to the United States or any possession thereof any firearms or ammunition in violation of section 922 (1); or

(D) willfully violates any other provision of this chapter,

shall be fined not more than $5,000, imprisoned not more than five years, or both.

STATEMENT

Petitioner Brian Kevin Clement was indicted in August 1994 by a federal grand jury sitting in the Eastern District of New York. The single-count indictment read as follows:

> On or about and between July 2, 1990 and August 3, 1994, within the Eastern District of New York and elsewhere, the defendant BRIAN KEVIN CLEMENT, not being a licensed importer, manufacturer, dealer or collector of firearms, did knowingly and wilfully transfer, sell, trade, give, transport, and deliver firearms to a person other than a licensed importer, manufacturer, dealer or collector, who the defendant knew did not reside in the State in which the defendant resided.

The indictment alleged that Clement had violated title 18, United States Code, sections 922(a)(5) and 924(a)(1)(D), which, together, provide that whoever "willfully violates" the legal proscription on providing a firearm to a person one knows to be a resident of another state commits a criminal act.[1]

Clement's case was tried before a jury. At the trial, the Government demonstrated that on some (unspecified) occasions during the 49-month period covered by the indictment, Clement, a resident of North Carolina, had transferred nine pistols to his father and brothers, who were residents of New

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[1] Although 922(a)(5) does not itself require willfulness, section 924(a)(1)(D), the penalty provision applicable to section 922(a)(5), does. The willfulness requirement in section 924(a)(1)(D) "add[s] a willfulness requirement to the underlying offense." *United States v. Collins*, 957 F.2d 72, 74 (2d Cir.), *cert. denied*, 504 U.S. 944 (1992). *See also United States v. Sanchez-Corcino*, 85 F.3d 549, 551 (11th Cir. 1996); *United States v. Obiechie*, 38 F.3d 309, 312 (7th Cir. 1994); *United States v. Otiaba*, 862 F. Supp. 251, 252 (D.N.D. 1994).

York. The trial court instructed the jury that to convict Clement it had to find that Clement had acted "knowingly and purposefully," and with an intent to commit "an act which the law forbids." The jury was not instructed that it was required to find that Clement had acted with a knowledge of the illegality of his acts,[2] and the Government introduced no evidence that Clement had such knowledge. The instruction was consistent with the well-settled authority of the Second Circuit, *see United States v. Collins*, 957 F.2d 72 (2d Cir.), *cert. denied*, 504 U.S. 944 (1992), and Clement did not object to the instruction.

Clement was convicted and, on June 27, 1995, sentenced to a term of thirty months' imprisonment to be followed by three years' supervised release. *See* Appendix C. A timely notice of appeal was filed on July 7, 1995. On August 21, 1996, the Second Circuit Court of Appeals affirmed petitioner's conviction on the ground that the instruction, if erroneous, was not plainly erroneous. After noting that "[t]he district court instructed the jury pursuant to *Collins*," the Second Circuit stated:

> In *Ratzlaf v. United States*, 114 S. Ct. 655, 663 (1994), the Supreme Court held that the phrase "wilfully violating" for purposes of 31 U.S.C. § 5322 requires that the government prove that the defendant was aware that his conduct was illegal. By analogy, Clement argues that "Collins must be reconsidered in light of *Ratzlaf*." Whether or not this is so is a hard question. *Compare United States*

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[2] The relevant jury instruction was as follows:

> The second element which the government must prove beyond a reasonable doubt is that the defendant willfully transferred a firearm to another person.
>
> To find that the defendant acted willfully, the Government must prove beyond a reasonable doubt that the person acted knowingly and purposefully and that the defendant intended to commit an act which the law forbids.

v. Obiechie, 38 F.3d 309, 312-15 (7th Cir. 1994) (disagreeing with *Collins* in light of *Ratzlaf*), *and United States v. Sanchez-Corcino*, 85 F.3d 549, 552-53 (11th Cir. 1996) (same), *with United States v. Hayden*, 64 F.3d 126, 128-30 (3d Cir. 1995) (disagreeing with *Collins*, but concluding that *Ratzlaf* is irrelevant to the inquiry). But this is a difficult issue that we need not reach.

Ratzlaf was decided before Clement's trial, yet Clement failed to object to the jury instructions. "[O]ur authority to reverse for errors not urged to the trial court is narrow indeed." *United States v. Pipola*, 83 F.3d 556, 561 (2d Cir. 1996). We may only reverse for "plain errors." "Plain error is defined as an error so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Tillem*, 906 F.2d 814, 825 (2d Cir. 1990).

Since the district court's jury instruction was completely consistent with a controlling Second Circuit precedent, and considering the fact that this court has applied that precedent even after the *Ratzlaf* decision, *see United States v. Ali*, 68 F.3d 1468, 1473 (2d Cir. 1995), it cannot be said that the jury instruction here was plain "error so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it."

See Appendix A at 3-4. On October 8, 1996, the Second Circuit denied without opinion petitioner's Petition For Rehearing and Suggestion For Rehearing In Banc. *See* Appendix B.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE MEANING OF SECTIONS 922(a)(5) AND 924(a)(1)(D).

Section 924(a)(1)(D) is one of four, simultaneously-enacted[3] penalty provisions (924(a)(1)(A-D)), three of which -- 924(a)(1)(A-C) -- prescribe punishment for whoever "knowingly" violates certain provisions of section 922, and only one of which -- 924(a)(1)(D) -- prescribes punishment for whoever "willfully violates" other provisions of that section. *See supra* at 2 (quoting statute). Under well-established precepts of statutory interpretation, the terms "knowingly violates" and "willfully violates" -- appearing in the same statute, in analogous provisions, simultaneously enacted -- must have different meanings. *See Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (if possible, effect must be given to every clause and word in a statute); *Helvering v. Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934) (Congress' use of separate terms in definitional sections of a statute suggests distinct meanings); *Potter v. United States*, 155 U.S. 438, 446 (1894) (word "willful" used to describe certain offenses but not others in same statute "cannot be regarded as mere surplusage; it means something"). The *mens rea* for 924(a)(1)(D) must be different from -- and greater than -- the *mens rea* for the other sections (A-C) of 924(a)(1).

Every court other than the Second Circuit that has considered the issue has unanimously found the conclusion inescapable: the "willfully violated" standard of section 924(a)(1)(D) *must mean* "intends to violate the law." *See United States v. Sanchez-Corcino*, 85 F.3d 549, 552-53 (11th Cir. 1996); *United States v. Hayden*, 64 F.3d 126, 130 (3d Cir. 1995)

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[3] *See* Firearms Owners' Protection Act of 1986 ("FOPA"), Pub. L. No. 99-308, 100 Stat. 449 (1986).

("[I]t is difficult to understand what more the 'willfully' language could require [than the 'knowingly' language], if not knowledge of the law.") (citation omitted); *United States v. Obiechie*, 38 F.3d 309, 315 (7th Cir. 1994) ("In our view, the only reasonable distinction between section 924(a)(1)'s 'knowingly' and 'willfully' standards is that the latter requires knowledge of the law."); *United States v. Hern*, 926 F.2d 764, 767 & n.6 (8th Cir. 1991); *United States v. Young*, 875 F. Supp. 350, 351 (W.D. Va. 1995) ("If 'willfully' is read to require only that the defendant intended to commit the acts that are proscribed by law, however, 'willfully' would have virtually the same meaning as that already established for 'knowingly.'") (citation omitted); *United States v. Otiaba*, 862 F. Supp. 251, 253 (D.N.D. 1994) ("The only way to distinguish 'willfully' from 'knowingly' [in section 924(a)(1)] is to hold that subsection (D) requires proof that the defendant knew of the illegality of his conduct.").

The Seventh Circuit's analysis in *Obiechie* has been widely followed, *see, e.g.*, *Sanchez-Corcino*, *supra*; *Hayden*, *supra*; *Young*, *supra*, and is correct:

> In construing subsection (D), we must necessarily turn our attention to the three accompanying penalty provisions. Of section 924(a)(1)'s four subsections, (D) alone requires a willful violation. Subsections (A), (B), and (C) require only that a defendant act "knowingly." Congress' use of the term "willfully" in subsection (D) indicates that it intended a *scienter* standard there that is distinct from the "knowingly" requirement of the previous three subsections.
>
> * * * *
>
> Congress would not have established separate *scienter* requirements in adjacent subsections had it intended a uniform standard. *Cf. Colautti v. Franklin*, 439 U.S. 379, 392, 99 S.Ct. 675, 684, 58 L.Ed. 2d 596 (1979) ("viable" not synonymous with "may be

> viable" in state abortion control statute); *Helvering v. Morgan's Inc.*, [*supra*] . . . .
>
> * * * *
>
> [T]he only reasonable distinction between section 924(a)(1)'s "knowingly" and "willfully" standards is that the latter requires knowledge of the law. [citations omitted].
>
> -- 38 F.3d at 314, 315.[4]

The only case to the contrary is *United States v. Collins*, which held that the phrase "willfully violates" in § 924(a)(1)(D) does not require proof that the defendant knew that his allegedly illegal actions were illegal.[5] *Collins* was plainly wrong, however, because it ignored the principle of statutory interpretation that every other court has found dispositive -- that different terms appearing in the same statute in analogous provisions, simultaneously enacted must have

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[4] Because sections 922(a)(5) and 924(a)(1)(D) are clear on their face, it is unnecessary to consider the underlying legislative history. *See Ratzlaf v. United States*, 510 U.S. at 147-48; *Holder v. Hall*, 114 S. Ct. 2581, 2612 n.28 (1994). In any event, consideration of that legislative history demonstrates that Congress intended "willfully violates" to mean "acts in violation of a known legal duty." *See* Hardy, *The Firearm Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 647-48 (1987). Even if there were doubt as to the meaning of "willfully violated" in section 924(a)(1)(D), any such doubt would have to be resolved in petitioner's favor, in light of the rule of lenity. *See Ratzlaf v. United States*, 510 U.S. at 148; *Hughey v. United States*, 495 U.S. 411, 422 (1990) (lenity principles "demand resolution of ambiguities in criminal statutes in favor of the defendant"); *Crandon v. United States*, 494 U.S. 152, 168 (1990); *United States v. Bass*, 404 U.S. 336, 347 (1971).

[5] *Collins* was followed by the Second Circuit in *United States v. Ali*, 68 F.3d 1468 (2d Cir. 1995). In *Ali*, however, the district court failed to charge the jury on the element of willfulness, and the Second Circuit found that the district court's failure was erroneous. *Ali* did not present the question that is central to this case -- the meaning of "willfully violated" in section 924(a)(1)(D) -- and the issue was not briefed to or addressed by the *Ali* Court.

different meanings. *See supra* at 6-8 (citing authority). Indeed, *Collins* never even referred to the crucial fact that section 924(a)(1)(D) was one of four, simultaneously enacted provisions, and that it alone referred to a "willful[] violat[ion]," while the other provisions provide for the lesser *mens rea* of "knowingly." *See Collins*, *supra*.

Collins' omission has been the focus of other courts' criticism of *Collins*. *See, e.g.*, *United States v. Obiechie*, 38 F.3d at 315 (noting that *Collins* did not "attempt[] to differentiate between FOPA's 'knowingly' and 'willfully' standards. Indeed, *Collins* even failed to note that FOPA applies a 'knowingly' standard to some violations and a 'willfully' standard to others.") (citations omitted); *United States v. Hayden*, 64 F.3d at 130 n.6 (concurring in *Obiechie's* discussion of *Collins*); *United States v. Sanchez-Corcino*, 85 F.3d at 553 n.1 (*Collins'* "analysis ignores the effect of Congress's use of 'knowingly' in the adjacent subsections of the statute on the meaning of 'willfully' in § 924(a)(1)(D), a point that, as did the *Obiechie* court, we think is critical to a proper interpretation."). Furthermore, as *Obiechie* and others have pointed out, *Collins*, which was the second decision to interpret the phrase "willfully violates" in § 924(a)(1)(D), never even referred to the first decision, *United States v. Hern*, *supra*, which, as noted above, interpreted "willfully violates" to mean "an intentional violation of a known legal duty." *See United States v. Hern*, 926 F.2d at 767 & n.6; *United States v. Obiechie*, 38 F.3d at 315; *United States v. Hayden*, 64 F.3d at 130 n. 6.

The split among the circuits affects millions of lawful individuals. As this Court has recognized, "there is a long tradition of widespread lawful gun ownership by private individuals in this country . . . . Guns in general are not deleterious devices or products or obnoxious waste materials, that put their owners on notice that they stand in responsible relation to a public danger." *Staples v. United States*, 114 S. Ct. 1793, 1799-1800 (1994) (internal quotations and citations omitted). There are countless innocent reasons to give a gun to someone who lives in another state -- for defense of the

home, for sport, for hunting, for repair -- all of which are "engage[d] in innocently." *Cf. Ratzlaf v. United States*, 510 U.S. at 144. Thus, imposing the requirement (as Congress did) that to be criminally convicted the defendant must know he is acting unlawfully when he provides a gun to a person from another state is hardly unreasonable; by contrast, the Second Circuit's abandonment of the willfulness requirement contravenes the statute, and puts millions of unwary, law-abiding Americans at risk of criminal convictions. The risk is especially great because section 924(a)(1)(D) supplies the *mens rea* element not only for 922(a)(5), but also for 14 other criminal provisions.[6] The confusion on the law governing such widespread activity that is, at most, *malum prohibitum* rather than *malum in se*, requires prompt resolution.

The split among the courts of appeals had a profound affect on Clement. The only evidence that Clement provided firearms to persons living in another state was Clement's own pre-arrest statement to a federal official.[7] The evidence demonstrated that Clement had no knowledge that his actions had been illegal. Thus, under the appropriate standard he would surely have been acquitted.

II. THE SECOND CIRCUIT MISAPPLIED THE PLAIN ERROR RULE.

Clement did not object to the trial court's instruction, and therefore the alleged error in the instruction must be evaluated

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[6] Section 924(a)(1)(D) provides the *mens rea* element for all provisions of Chapter 44, other than those set forth expressly in sections 924(a)(1)(A-C) or otherwise exempted by the preamble. Section 924(a)(1)(D) thus supplies the *mens rea* element for sections 922(a)(1-3, 7-9), 922 (b)(1-5), 922(c), 922(e), and 922(n).

[7] Clement's statement was made in Virginia. When Clement made his statement there were no cases in the Fourth Circuit interpreting "willfully violated" in section 924(a)(1)(D). Since his statement, one court in the Fourth Circuit has considered the issue and found that "willfully violated" means "intends to violate the law." *See United States v. Young*, 875 F. Supp. at 351.

pursuant to the "plain error" rule set forth in Federal Rule of Criminal Procedure 52(b). *See* Fed. R. Crim. P. 52(b). In *United States v. Olano*, 507 U.S. 725 (1993), this Court held that to win a reversal for an alleged error that was not objected to below, a defendant must demonstrate that (1) the alleged error is indeed an error, (2) the error must be "'plain,'" which at a minimum means "clear under current law," *id.* at 734, (3) the error must have affected the defendant's "substantial rights" which ordinarily requires a "showing of prejudice," *id.* at 735; and (4) failure to reverse would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," *id.* at 736.

The decision below never considered the first, third or fourth *Olano* factors, but focused exclusively on the second, and found that the instruction, if erroneous at all, was not plainly erroneous because it was "completely consistent with controlling circuit precedent" (*i.e., Collins*), and thus the assumed error was not "'so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it.'" *See* Appendix A at 3 (quoting *United States v. Tillem*, 906 F.2d 814, 825 (2d Cir. 1990)). The necessary implication is that even if the first, third and fourth factors were satisfied -- that is, even if there was an error that prejudiced the defendant's substantial rights, and that seriously affected the fairness and integrity of the case -- reversal would be improper simply because there was a prior, controlling circuit precedent.

The court's reasoning is erroneous, and leads to plainly unjust results. If followed, it would compel defendants on trial to make futile objections in the face of controlling circuit precedent, simply in order to avoid plain error review. As other courts of appeals have noted, such a rule is insupportable, because it would simply lead to a waste of judicial resources and the maladministration of justice. *See United States v. Keys*, 95 F.3d 874, 878-79 (9th Cir. 1996) *(en banc)*; *United States v. Holmes*, 93 F.3d 289, 292-93 (7th Cir. 1996); *United States v. Baumgardner*, 85 F.3d 1305, 1309 (8th Cir. 1996) ("[T]o require a defendant to raise all possible objections at trial despite settled law to the contrary would

encourage frivolous arguments, impeding the proceeding and wasting judicial resources.") (citation omitted); *United States v. David*, 83 F.3d 638, 645 (4th Cir. 1996) ("Requiring objection at trial in the face of established precedent to the contrary would result in defendants raising frivolous objections simply to ensure that they would receive on appeal the benefit of any later reversals of precedent -- the very kind of waste of judicial resources that the contemporaneous objection rule was intended to discourage.").

Moreover, the decision below means that the Supreme Court is the only court that can resolve the conflict among the courts of appeals regarding the interpretation of sections 922(a)(5) and 924(a)(1)(D). Because there is controlling Second Circuit authority (*Collins*), any objection in a district court in the Second Circuit to a charge that does not instruct the jury on willfulness would be futile. Thus, no objection will be made, and any review would be summarily rejected, as was Clement's. The problem is especially grave because the decision below was unpublished and "may not be cited as precedential authority in this or any other court." Thus no defendant will be on notice that an objection to controlling authority may be warranted.

The district court erred in failing to instruct the jury on an element of the crime as to which the Government offered no evidence. Under the law of every circuit that has considered the issue (including the Second), such error -- if plain -- requires reversal. *See, e.g., United States v. Keys*, 95 F.3d at 880-81; *United States v. Webster*, 84 F.3d 1056, 1067 (8th Cir. 1996); *United States v. David*, 83 F.3d at 646-48; *Napoli v. United States*, 32 F.3d 31, 36 (2d Cir. 1994) (under plain error rule, an unobjected to "jury instruction which omits an element of the offense does not warrant reversal if the element was proven by overwhelming evidence"), *modified on reh'g*, 45 F.3d 680 (2d Cir.), *cert. denied*, 115 S. Ct. 1796 (1995); *United States v. Rogers*, 18 F.3d 265, 268 (4th Cir. 1994) (plainly erroneous failure to charge an element of the crime necessarily requires reversal); *United States v. Xavier*, 2 F.3d 1281, 1287 (3d Cir. 1993). The Second Circuit's holding that

the district court's instruction does not require reversal simply because it was consistent with "controlling circuit precedent" means that had Clement objected, the Second Circuit would have reviewed the alleged error under the more lenient standard of Rule 52(a). But it would have been improper for Clement to object below because the objection would have been futile. *See* Appendix A at 3 (*Collins* was a "*controlling* Second Circuit precedent") (emphasis added). Regardless whether the district court's instruction was consistent with *Collins*, the critical fact is that the jury instruction in this case was inconsistent with the plainly proper -- and, but for the Second Circuit, unanimous -- interpretation of section 924(a)(1).

CONCLUSION

For the foregoing reasons, Petitioner Brian Kevin Clement respectfully requests this Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, and to reverse his conviction.

Dated: New York, New York
January __, 1997

Respectfully submitted,

Earl Nemser

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of August, one thousand nine hundred and ninety-six.

UNITED STATES COURT OF APPEALS
FILED
AUG 21, 1996
SECOND CIRCUIT

PRESENT:

HON. THOMAS J. MESKILL,
HON. GUIDO CALABRESI,
HON. FRED I. PARKER,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

ORDER
#95-1445

BRIAN KEVIN CLEMENT,

Defendant-Appellant.

Appearing for Appellant: BENJAMIN E. ROSENBERG, Shereff, Friedman, Hoffman & Goodman, LLP, New York, N.Y.

Appearing for Appellee: KELLY ANN MOORE, Assistant United States Attorney, Eastern District of New York, Brooklyn, N.Y.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York (Johnson, *J.*), it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Brian Kevin Clement appeals from a judgment of conviction entered on June 27, 1995, in the United States District Court for the Eastern District of New York (Johnson, *J.*), for transmitting firearms to persons he knew or should have known lived in another state, in violation of 18 U.S.C. § 922(a)(5).

Clement was questioned by a Bureau of Alcohol, Tobacco and Firearms ("ATF") agent after a trace of a semi-automatic weapon seized pursuant to the arrest of an individual in New York City revealed that Clement had purchased the weapon in North Carolina. ATF records indicated that Clement had purchased ten other semi-automatic handguns between 1990 and 1994. After Clement confessed to having transferred a number of these handguns to his father and four brothers, all of whom are New York residents, he was indicted and convicted for violating § 922(a)(5).

Clement raises three arguments on appeal. Because Clement did not preserve any of these issues for appeal by making the proper objections at trial, he may prevail only if he can show that the alleged mistakes made by the district court amounted to "plain error." Fed. R. Crim. P. 52(b); *United States v. Olano,* 507 U.S. 725, 731-31 (1993). We conclude

that none of the errors, if they were errors at all, were "plain." We therefore reject each of Clement's arguments.

1. Jury Instructions. The penalty provision applicable to § 922(a)(5) is 18 U.S.C. § 924(a)(1)(D), which provides that "whoever . . . willfully violates [§ 922(a)(5)] shall be fined not more than $5,000, imprisoned not more than five years, or both." In *United States v. Collins,* 957 F.2d 72, 76 (2d Cir. 1992), *cert. denied,* 504 U.S. 944 (1992), we held that, in order to prove willfulness under § 924(a)(1)(D), the government need not establish that the defendant knew that his conduct was illegal. The district court instructed the jury pursuant to *Collins.*

In *Ratzlaf v. United States,* 114 S. Ct. 655, 663 (1994), the Supreme Court held that the phrase "wilfully violating" for purposes of 31 U.S.C. § 5322 requires that the government prove that the defendant was aware that his conduct was illegal. By analogy, Clement argues that "*Collins* must be reconsidered in light of *Ratzlaf.*" Whether or not this is so is a hard question. *Compare United States v. Obiechie,* 38 F.3d 309, 312-15 (7th Cir. 1994) (disagreeing with *Collins* in light of *Ratzlaf), and United States v. Sanchez-Corcino,* 85 F.3d 549, 552-53 (11th Cir. 1996) (same), *with United States v. Hayden,* 64 F.3d 126, 128-30 (3d Cir. 1995) (disagreeing with *Collins,* but concluding that *Ratzlaf* is irrelevant to the inquiry). But this is a difficult issue that we need not reach.

Ratzlaf was decided before Clement's trial, yet Clement failed to object to the jury instructions. "[O]ur authority to reverse for errors not urged to the trial court is narrow indeed." *United States v. Pipola,* 83 F.3d 556, 561 (2d Cir. 1996). We may only reverse "plain errors." "Plain error is defined as an error so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Tillem,* 906 F.2d 814, 825 (2d Cir. 1990).

Since the district court's jury instruction was completely consistent with a controlling Second Circuit precedent, and considering the fact that this court has applied that precedent

even after the *Ratzlaf* decision, *see United States v. Ali,* 68 F. 3d 1468, 1473 (2d Cir. 1995), it cannot be said that the jury instruction here was plain "error so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it."

2. Duplicity. Clement's second contention is that his indictment was duplicitous. Although he was accused of transporting nine different firearms on a number of occasions, the indictment contained only a single count, charging him with illegally transferring "firearms" "between July 2, 1990 and August 3, 1994." "An indictment is duplicitous if it joins two or more distinct crimes in a single count." *United States v. Aracri,* 968 F.2d 1512, 1518 (2d Cir. 1992). Because he forfeited his objection to duplicity by failing to object at trial, *see, e.g., United States v. Droms,* 566 F.2d 361, 363 (2d Cir. 1977), Clement must again show plain error. This he cannot do. "[A]cts that could be charged as separate counts of an indictment may instead be charged in a single count if those acts could be characterized as part of a single continuing scheme." *United States v. Tutino,* 883 F.2d 1125, 1141 (2d Cir. 1989), *cert. denied,* 493 U.S. 1081 (1990). Clement argues that our cases applying this rule have been characterized by much more clear evidence of a continuing scheme than the government has alleged here, but since Clement failed to object, we cannot be certain whether or not the government would have been able to provide more evidence of a continuing scheme had the potential error in the indictment been called to its attention. In these circumstances, the alleged error cannot be considered plain.

3. Sentencing Guidelines. Clement's final argument is that the district court applied the wrong version of the Sentencing Guidelines. If the Guidelines are amended to provide a more severe penalty before sentencing, but after the criminal act took place, the old version of the Guidelines must be applied in order to avoid a violation of the Ex Post Facto Clause. *United States v. Keller,* 58 F.3d 884, 889 (2d Cir. 1995). In this case, Clement's indictment charged him with illegally transferring firearms between July 1990 and August 1994.

The district court applied the penalty provision in effect at the time of sentencing -- a provision that was made more severe in November 1991. Clement argues that it is possible that the jury only found him guilty of transferring firearms before November 1991. Here too, however, Clement failed to object, and we may only reverse for plain error. If a crime takes place over a period of time, the Guidelines in effect when the last events occurred control. *United States v. Story,* 891 F.2d 988, 991-94 (2d Cir. 1989). Because Clement failed to object to the allegedly duplicitous nature of the indictment, we do not know whether or not the government would have been able to prove the existence of a continuing scheme sufficient to invoke this rule. As such, we once again cannot say that the alleged error was "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it."

We have examined all of Clement's contentions, and find them to be without merit. The district court's judgment is therefore affirmed.

/s/ Thomas J. Meskill by [illegible]

Hon. Thomas J. Meskill

/s/ Guido Calabresi

Hon. Guido Calabresi

/s/ Fred I. Parker by [illegible]

Hon. Fred I. Parker

Circuit Judges.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of October, one thousand nine hundred and ninety-six.

USA,

Appellee,

Dkt No: 95-1445

v.

Clement,

Appellant.

UNITED STATES COURT OF APPEALS
FILED
OCT 8, 1996
GEORGE LANGE III, CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Brian Kevin Clement.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador

Beth J. Meador,
Administrative Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X UNITED STATES OF AMERICA -VS- BRIAN KEVIN CLEMENT 44566-053 Defendant ----------X	JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT CASE NUMBER: 94 CR 0928(SJ)

Francois Au, Esq.
291 Broadway, 13th Floor
New York, NY 10007
Defendant's Attorney & Address

THE DEFENDANT:

_____ pleaded guilty to count one of the indictment.

__XX__ was found guilty on count one of the superseding indictment after a plea of not guilty.

_____ The Court accepts plea taken before Magistrate Judge CHREIN.

_____ Accordingly, the defendant is ADJUDGED guilty of such count(s), which involve the following offenses:

TITLE & SECTION	NATURE & OFFENSE	COUNT NUMBER(S)
18 U.S.C. 922(a)(5)	Illegal Transportation & Delivery of Firearms	1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_____ The defendant has been found not guilty on count[s] and is discharged as to such counts.

__X__ All open counts are dismissed on the motion of the United States.

__X__ It is ORDERED that the defendant shall pay to the United States a special assessment of $50.00 which shall be due immediately.

It is further ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessment imposed by this Judgment are fully paid.

Defendant's Soc. Sec. # 082-68-4535

Defendant's Date of Birth 04/07/65

Defendant's Address:

custody

June 27, 1995
Date of Imposition of Sentence

/s/ Sterling Johnson Jr.
STERLING JOHNSON, JR.
U.S.D.J.

June 27, 1995
Date

A TRUE COPY TEST
Dated: June 27, 1995

ROBERT C. HEINEMANN
CLERK

By: /s/ August Marziliano
AUGUST MARZILIANO
DEPUTY CLERK

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY (30) MONTHS.

_____ The Court makes the following recommendation to the Bureau of Prisons:

_____ The defendant is remanded to the custody of the United States Marshal.

_____ The defendant shall surrender to the United States Marshal for this district,

_____ at _____ on _____.
_____ as notified by the Marshal.

_____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons OR to the US Marshall for the Eastern District of New York.

_____ before 2:00 P.M. on _____.
_____ as notified by the United States Marshal.
_____ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

U.S. Marshal Service
Defendant in custody as of 3/30/95.

Michael A. Pizzi
USMS, EDNY

_____

_____

Defendant delivered on 7 Aug 1995 to Sch - SCP at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

8-3-95

By /s/ [illegible]
_____
DEPUTY MARSHAL

Del to USP Law
/s/ A Slade

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

Special condition[s] of supervised release:

_____ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) The defendant shall not leave the judicial district without the permission of the court or probation officer;
3) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) The defendant shall support his or her dependents and meet other family responsibilities;
6) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
10) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Supreme Court, U.S.
FILED
MAR 12 1997
OFFICE OF THE CLERK

(2)

No. 96-1080

In the Supreme Court of the United States

OCTOBER TERM, 1996

BRIAN KEVIN CLEMENT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

10 pp

QUESTION PRESENTED

Whether petitioner is entitled to a reversal of his conviction under 18 U.S.C. 922(a)(5) and 924(a)(1)(D) because the trial court, without objection, failed to instruct the jury that the requirement that petitioner "willfully violate[d]" the law meant that he acted with knowledge that his conduct was illegal.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

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BRIAN KEVIN CLEMENT, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1996. A petition for rehearing was denied on October 8, 1996 (Pet. App. A6-A7). The petition for a writ of certiorari was filed on January 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of transferring firearms to persons he knew or had reasonable cause to believe resided in another State, in violation of 18 U.S.C. 922(a)(5) and 924(a)(1)(D). He was sentenced to 30 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. A1-A5.

1. Between 1990 and 1994, petitioner bought 11 semi-automatic handguns in North Carolina and transferred nine of them to his father and four brothers in New York. An ATF agent traced to petitioner one handgun that had been seized from a person arrested in New York City. When questioned about the weapon, petitioner confessed to transferring that and the other weapons to his father and brothers. Pet. App. A2.

2. Section 922(a)(5) prohibits the transfer of "any firearm to any person * * * who the transferor knows or has reasonable cause to believe does not reside in * * * the State in which the transferor resides." Although Section 922(a)(5) does not contain a "willfulness" element, the penalty provision under which petitioner was punished—18 U.S.C. 924(a)(1)(D)—requires a showing that the defendant "willfully violate[d]" Section 922(a)(5). See Pet. 2-3 (quoting Sections 922(a)(5) and 924(a)(1)(D)). At petitioner's trial, the district court, applying circuit precedent, see *United States* v. *Collins*, 957 F.2d 72 (2d Cir.), cert. denied, 504 U.S. 944 (1992), instructed the jury that, "[t]o find that [petitioner] acted willfully, the Government must prove beyond a reasonable

doubt that [petitioner] acted knowingly and purposefully and that [petitioner] intended to commit an act which the law forbids." Pet. 4 n.2; see Pet. App. A3. Petitioner did not object to that instruction. Pet. 4.

3. On appeal, petitioner argued for the first time that the "willfully violates" requirement of Section 924(a)(1)(D) requires a showing that a defendant acted with knowledge that his conduct was illegal, and that the district court's failure to instruct the jury to that effect was reversible error. Petitioner argued that *Collins* was wrongly decided and that it "must be reconsidered in light of *Ratzlaf* [v. *United States*, 510 U.S. 135 (1994)]." Pet. App. A3. *Ratzlaf*, which was decided before petitioner's trial, see *ibid.*, construed the "willfully violating" requirement in prosecutions for structuring monetary transactions in violation of 31 U.S.C. 5322(a) and 5324(3) (1988) to require knowledge that the prohibited transaction was illegal.

In an unpublished opinion, the court of appeals determined that the precedential validity of *Collins* after *Ratzlaf* "is a difficult issue that we need not reach" because petitioner failed to object to the district court's instruction on willfulness. Pet. App. A3. Applying plain-error review under Federal Rule of Criminal Procedure 52(b), the court held that reversal would be warranted only if there were error "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." Pet. App. A3. The court concluded that any error here did not meet that standard because, at the time of petitioner's trial, "the district court's jury instruction was completely consistent with a controlling Second Circuit precedent," which the Second Circuit has followed (without addressing the issue presented here) "even after the

Ratzlaf decision." *Id.* at A3-A4 (citing *United States* v. *Ali*, 68 F.3d 1468, 1473 (1995), modified on reh'g on other grounds, 86 F.3d 275 (2d Cir. 1996)).[1]

DISCUSSION

Petitioner contends (Pet. 6-7) that this Court should resolve a conflict in the circuits on whether a conviction under 18 U.S.C. 924(a)(1)(D) for "willfully violat[ing]" 18 U.S.C. 922(a)(5) requires proof of knowledge of illegality. Several courts of appeals have held, in the wake of *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), that the "willfulness" element in prosecutions under 18 U.S.C. 922(a)(5) and 924(a)(1)(D) requires a showing that a defendant acted with knowledge that his conduct was illegal. See *United States* v. *Sanchez-Corcino*, 85 F.3d 549, 552-553 (11th Cir. 1996); *United States* v. *Hayden*, 64 F.3d 126, 130 (3d Cir. 1995); *United States* v. *Obiechie*, 38 F.3d 309, 315 (7th Cir. 1994); see also *United States* v. *Hern*, 926 F.2d 764, 767 & n.6 (8th Cir. 1991). In a pre-*Ratzlaf* decision, the Second Circuit has held to the contrary. See *United States* v. *Collins*, 957 F.2d 72 (2d Cir.), cert. denied, 504 U.S. 944 (1992). The court of appeals declined, however, to reach the "hard question" whether, after *Ratzlaf*, *Collins* should be reconsidered. See Pet. App. A3. Because petitioner failed to object at trial, the court held narrowly that the district court's instruction, which was consistent with *Collins*, did not constitute "plain error" under

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[1] Petitioner acknowledges (Pet. 8 n.5) that *Ali* "did not present the question that is central to this case—the meaning of 'willfully violated' in section 924(a)(1)(D)—and the issue was not briefed to or addressed by the *Ali* Court." Instead, *Ali* appeared to involve a complete failure to issue any instruction on the element of willfulness. See 68 F.3d at 1473.

Fed. R. Crim. P. 52(b). See Pet. App. A3-A4. Resolution of the plain-error issue would not necessarily resolve the conflict in the circuits raised by *Collins*.[2] Moreover, the court's holding on plain error was correct and does not conflict with any decision of another court of appeals.

1. Rule 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." That Rule entitles a defendant to relief only if he can make four distinct showings. The defendant must establish that the district court committed (1) an "error" (2) that was "plain," "clear," or "obvious" and (3) that affected his "substantial rights." *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993). Fourth, even when those showings are made, "Rule 52(b) is permissive, not mandatory," *id.* at 735, and a reviewing court may exercise its "discretion" to reverse a conviction for plain error only "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,'" *id.* at 736.

Here, the court of appeals rejected petitioner's plain-error claim without reaching the issue of whether the jury instruction on willfulness was erroneous because the court concluded that there was no error "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite [petitioner's] failure to object." Pet. App. A3; see generally *United States* v. *Frady*, 456 U.S. 152, 163 (1982). The court explained that, in the Second Circuit, it was unclear at the time of trial—and is still

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[2] Indeed, until the Second Circuit addresses the continuing validity of *Collins* in light of *Ratzlaf*, it is unclear whether any circuit conflict will persist on the question presented.

unclear today (see Pet. App. A3)—whether a Section 922(a)(5) defendant is entitled to the willfulness charge that petitioner belatedly claims he should have received. By the time of petitioner's trial, this Court had already decided *Ratzlaf*, the principal authority on which petitioner bases his challenge to the continued validity of *Collins*.[3] Since petitioner's trial, no intervening decision of this Court or the Second Circuit has resolved the tension that petitioner perceives between *Ratzlaf* and *Collins*. Thus, whether or not Rule 52(b) permits relief in the "special case where [an] error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified," *Olano*, 507 U.S. at 734, the "error" (if any) that petitioner alleges was plain neither at the time of trial nor at the time of appeal. It therefore does not warrant reversal under the plain-error rule. See *Olano*, 507 U.S. at 734.

2. Although we believe that this petition could appropriately be denied before disposition of *Johnson* v. *United States*, No. 96-203 (argued Feb. 25, 1997), this Court may nonetheless wish to hold the petition pending its decision in that case. Here, as in *Johnson*, petitioner characterizes the error at issue as a "fail[ure] to instruct the jury on an element of the crime," Pet. 12, and suggests that such errors automatically require reversal even where a defendant did not object at trial, see Pet. 12-13 (citing cases involving other criminal offenses). Although here, unlike

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[3] For that reason, it is not clear that petitioner is correct in claiming (Pet. 11-13) that a trial objection based on *Ratzlaf* would have been "futile." The Second Circuit itself noted that, after *Ratzlaf*, the precedential status of *Collins* presents a "difficult issue." Pet. App. A3.

Johnson, there is no intervening precedent that establishes that the court of appeals committed error, this Court's resolution of the plain-error issue in *Johnson* could bear on the proper disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Johnson* v. *United States*, No. 96-203, and then disposed of accordingly.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney

MARCH 1997